Petitioners thereupon moved to alter or amend the judgment in reliance on Rule 59(e) of the Federal Rules of Civil Procedure, arguing that this Court's decision in *Kay v. Ehrler*, 111 S.Ct. 1435 (1991), which had issued six months before the district court's judgment on attorneys' fees, constituted an intervening change in law which mandated that Mr. Kattan receive no fees whatsoever for his services. Petitioners had taken no steps to call the *Ehrler* decision to the district court's attention during the six months prior to entry of the fee award.

The district court denied Defendant's Rule 59(e) motion, holding that Petitioners had waived any argument that Mr. Kattan was ineligible for fees because he was representing himself by failing to raise it at the appropriate time. App. 33a-35a. In making its finding of waiver, that court relied on Petitioners' concessions as to Mr. Kattan's entitlement to fees. It also relied on Petitioners' failure to argue the rule of *Lawrence v. Staats, supra,* in declining to hold that this Court's decision in *Kay v. Ehrler* constituted a change of law not reasonably anticipated so as to relieve Petitioners of the effect of their waiver. App. 34a.[8]

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[8] In addition, the district court pointed out that Petitioners had failed to present it with reasons to extend *Kay v. Ehrler*, which was a case arising under 42 U.S.C. §1988, to an action under the EHA. App. 34a. The Kattans had argued to the district court that *Kay v. Ehrler* need not control an EHA case because the EHA's unique statutory scheme, under which a parent must be named a plaintiff in order to receive procedural rights that are in fact for the benefit of the co-plaintiff minor child, requires a parent attorney to represent "himself" in order to represent his child. The Kattans also argued that the *Ehrler* case would not foreclose fees for Mr. Kattan for work performed under the supervision of co-counsel. Both distinctions considerably weakened application of the reason behind the rule of *Ehrler* – to encourage the retention of independent counsel.

The court of appeals affirmed the district court's finding of waiver, and also held that the district court did not abuse its discretion in denying Petitioners' attempt to raise the *pro se* objection for the first time after judgment by motion under Rule 59(e). App. 4a-6a.[9] The court of appeals also declined to exercise its discre ionary power under 28 U.S.C. §2106 to reverse the district court so as to bring the judgment in this case into conformity with *Kay v. Ehrler,* reasoning that the decision in *Kay v. Ehrler* did not state a new legal principle that was previously unavailable to Petitioners for practical purposes, and holding that no exceptional circumstances existed in this case to make it just to relieve Petitioners from their waiver. App. 7a-8a.[10]

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek to elevate a simple case of waiver and exercise of discretion into an issue of public importance worthy of this Court's exercise of its limited review resources. Petitioners attempt to do so first by framing the Question Presented in argumentative terms, thereby ignoring the finding of both courts below as well as matters of public record. Next, Petitioners fail to acknowledge the discretionary nature of the decisions for which

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[9] Contrary to Petitioners' assertion (Petition at 9), the docket of the Court of Appeals for the D.C. Circuit in this case shows that its decision of June 15, 1993 in Nos. 92-7011 and 92-7012 was amended on June 30, 1993.

[10] The Court of Appeals explicitly declined to decide whether the *Ehrler* decision should control this EHA case. App. 4a. If the Petition is granted, these issues would have to be decided in this Court's review. *Compare, Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153 (March 1, 1994) (the goals and objectives of the governing statute may require different exercise of discretion under fee-shifting statutes with identical language).

they seek review and ignore the limited review available for matters so committed. Petitioners also suggest non-existent conflicts between the circuit courts and/or the decisions of this Court, and assert fanciful burdens on the administration of justice that they claim will materialize if this Court declines to intervene. Closer scrutiny reveals the flaws in Petitioners' reasoning and leads to a conclusion that issuance of a writ is inappropriate in this case.

I.
THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY PETITIONERS.

Petitioners ask this Court to make one central assumption in accepting this case for review – that they, as Defendants below, were "foreclosed by the law of the Circuit" from advancing, as a defense to the Kattans' application for attorneys' fees, that Mr. Kattan should be ineligible to receive compensation for legal services because he represnted himself.

This one assumption is central to Petitioners' entire argument, as they repeatedly urge the Court that the decision of the District of Columbia Circuit in the case of *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977), based on the attorney fee provision of the Freedom of Information Act, resolved beyond question that an attorney representing his child, wife and himself was eligible to receive fees for legal services under the attorney fee provision of the EHA. *See* Petition at Question Presented 3, 7, 10-12, 19-21.

In fact, the reasoning of *Cuneo* rests on policy considerations unique to FOIA and the very language of *Cuneo* concedes that the law is not clear as to *pro se* fee awards under other fee-shifting statutes. In addition, *the very*

court in which Petitioners were litigating had held in 1984 (well after *Cuneo*) that attorneys representing themselves were not entitled to attorneys' fees under 42 U.S.C. §1988. *Lawrence v. Staats,* 586 F. Supp. 1375, 1378-80 (D.D.C. 1984), *aff'd sub nom. Lawrence v. Bowsher,* 931 F.2d 1579 (D.C. Cir. 1991). Thus, to the extent a decision under 42 U.S.C. §1988 should be seen to control a decision under the attorney fee provision of the EHA (which in asserting the controlling force of *Kay v. Ehrler* Petitioners contend), the court of appeals correctly held in this case that it was not at all clear in 1988, when Petitioners opposed the Kattans' fee application before the district court with multiple grounds of defense, whether *pro se* attorneys were eligible for fees under EHA, and whether all fee-shifting statutes would be treated alike. As the district court opinion in *Lawrence v. Staats* makes clear, quite a number of other courts had similarly concluded by 1984 that *pro se* litigants were ineligible for attorneys fees under 42 U.S.C. §1988 and other fee-shifting statutes. *Lawrence v. Staats,* 586 F. Supp. 1375, 1378-79 (1984). Moreover, as of the date of Petitioners' opposition to the Kattans' fee application in the district court, a number of commentators had written on the subject of attorneys' fees for *pro se* representation in civil rights cases, each citing rulings rejecting such fees. Comment, *Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants,* 34 Stanford Law Rev. 659 (1982); Comment, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act,* 53 George Washington L. Rev. 291 (1984-85); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem,* 1986 Duke L.J. 435, 456 (1986); Annot.: Award of Attorneys' Fees to Pro Se Litigant Under 42 U.S.C. §1988, 82 ALR Fed 800 (1987).

Petitioners asked the court of appeals and now ask this Court to determine as an underlying predicate to the question presented that they were "foreclosed" as a practical matter from raising the *pro se* issue in 1988 due to a fear of sanctions under Rule 11. Yet is is ludicrous to fear sanctions when the court of appeals in your circuit has stated that "the law is not clear" and when a party can cite as authority for advancing an argument a published decision by another judge of the very court to whom the argument is addressed[11] or district court or circuit court decisions from other circuits.[12] It is also ludicrous to fear sanctions in responding to an argument first raised by your opponent. Here, the Kattans flagged the *pro se* issue in their fee petition, alerting a reasonable party to it. Defendants were plainly entitled to respond to the Kattans' argument without fear of sanctions.

After this Court's decision in *Kay v. Ehrler* on April 16, 1991, Petitioners took no step to bring that decision to the district court's attention, even though the Kattans' fee application was still under submission and would remain so for another six months. Petitioners cannot argue that they were unaware that the application was still pending or that calling the court's attention to an allegedly relevant intervening Supreme Court decision is a common and appropriate practice. Surely Petitioners

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[11] *Staats* was apparently on appeal in 1988; no order from the Court of Appeals reversed *Staats* based on *Cuneo*. For this reason alone Petitioners' asserted fear of sanctions for citing the *Staats* opinion rings empty.

[12] At least eleven circuit court decisions denying attorneys' fees to litigants representing themselves were readily discoverable in 1988. *See*, Annot.: Award of Attorneys' Fees to Pro Se Litigants Under 42 U.S.C. § 1988, 82 ALR Fed 800, 804-08 (1987).

can not ask this Court to conclude that they were "foreclosed" from taking this step to supplement their pending opposition. Petitioners' failure to act during this six month period alone renders the Question Presented to this Court misleading and review on this basis inappropriate.

II.
THE PETITION REQUESTS REVIEW OF MATTERS LEFT TO THE DISTRICT COURT'S DISCRETION.

In the decision for which review is sought, the D.C. Circuit affirmed the district court's exercise of its discretion[13] to award counsel fees in the face of its finding of a waiver of an available defense to such fees. The court of appeals also upheld the district court's exercise of its discretion to decline to consider such a waived defense in the context of a motion under Rule 59(e), filed after entry of judgment and six months after publication of the decision which Petitioners contend to be an intervening change in law. The discretionary nature of a district court's decision under Rule 59(e) and the limited scope of appellate review thereof is widely recognized.[14]

Both of the discretionary decisions which Petitioners ask this Court to review were made in the context of a

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[13]This Court has very recently confirmed that the decision of whether or not to award fees is one committed to the sound discretion of the trial judge under fee shifting statutes providing that the district court "may" award fees. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158 (March 1, 1994).

[14]*See, e.g., Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *Temkin v. Frederick County Commr's*, 945 F.2d 716, 724-25 (4th Cir. 1991); *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991); *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1305 (7th Cir. 1991); *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986).

case where defendants below had tenaciously attempted to defend an untenable position, to prevent a disabled child from receiving therapy that everyone conceded she needed and was due. See *Kattan by Thomas v. D.C.*, 691 F. Supp. 1539, 1542-45 (D.D.C. 1988). The court of appeals wisely found no abuse of discretion by the judge who was present to observe Petitioners' conduct of the proceedings below. We respectfully suggest that the court of appeals' respect for the trial court's decision should be afforded great weight by this Court.

III.

THE COURT OF APPEALS PROPERLY DECLINED TO EXERCISE ITS DISCRETIONARY POWER UNDER 28 U.S.C. §2106 TO AFFORD RELIEF TO PETITIONERS, BECAUSE JUSTICE UNDER THE CIRCUMSTANCES WOULD NOT BE SERVED THEREBY.

The court of appeals declined to exercise its own discretion under 28 U.S.C. §2106 to add this case to the short list of cases in which courts of appeal consider arguments not advanced to the lower courts or apply outcome-determinative changes of law which should not reasonably have been foreseen by the parties to cases developed under earlier law.[15] That statute, which creates a narrow exception to the usual rule that an appellate court only considers matters that have been raised in the court below, is sparingly used in exceptional circumstances, and then only to prevent clearly inequitable results or to avoid deprivation of newly emerging

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[15] The case of *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173, 2177-79 (1993), cited by Petitioners (Petition at 13), holds that a court of appeals has *discretion* to overlook a waiver. It does not hold that that discretion must be exercised to do so.

constitutional doctrines.[16] The statute is not designed to afford a defeated party another day in court because he thinks that if he were given the opportunity to try his case again on another theory he might prevail. It should not be available to a party who has waived an obvious issue below after having been put on notice of the issue by the opposing party, as happened here.

In any event, this is not a case that can seriously be argued to be one in which injustice will result from affirmance of the district court's award of fees to Mr. Kattan. The court of appeals was fully briefed on Petitioners' performance in the court below,[17] and properly exercised its discretion to do justice in this case. We respectfully suggest that this Court should give due deference to its decision.

IV.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners assert that the court of appeals' decision conflicts both with decisions of this Court and with those of other circuits. Both assertions are wrong.

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[16] *See*, Annot.: When Will Federal Court of Appeals Review Issue Raised By Party for First Time on Appeal Where Legal Developments After Trial Affect Issue, 76 ALR Fed 522 (1986).

[17] Brief for Sarah Kattan *et al.*, filed in Nos. 92-7011 and 92-7012 in the Court of Appeals for the D.C. Circuit on January 12, 1993, at pages 4-7, and record there cited.

A. There is no conflict with this Court's decisions.

Petitioners argue that the decision below merits review because it conflicts with opinions in which this Court has stated that the federal courts have the obligation to decide cases in accordance with law. Petition at 12-15. Petitioners' formulation, closely scrutinized, is really no more than an argument that this Court should grant review because Petitioners believe the decision below to have been wrongly decided. Presumably every litigant who disagrees with a ruling could make a similar appeal for certiorari. Yet this Court has focused its review on cases where the decision below is in direct conflict with its prior opinions on the same subject matter or with such decisions by other circuits.

As noted previously, the court of appeals in this case simply respected the trial court's finding of waiver, rejected Petitioners' argument that they were foreclosed from raising the *pro se* defense before judgment, and reviewed the record below only to exercise its discretion to reject the notion that "justice under the circumstances" required reversal.[18] Petitioners have simply cited no opinion of this Court holding that a court of

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[18] Petitioners argue that the Court of Appeals, with its reference to "exceptional circumstances," applied an improper standard to the question of when an issue will be decided on appeal that was not raised below. Petition at 16. Yet in one of the cases Petitioners rely on, *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), this Court reasoned as follows in deciding an issue that had not been raised at the trial level:

> "There may always be *exceptional cases or particular circumstances* which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

312 U.S. at 557 (emphasis added).

appeals must reject a trial court finding of waiver, or a trial court's finding that a change of law was not reasonably anticipated, or a discretionary decision to award fees and to deny relief from waiver in the context of a Rule 59(e) motion.

Petitioners rely on *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), but in that case this Court found it significant in exercising its discretion to review an issue that had not been preserved in a timely fashion that *the trial court declined to find a waiver in failure to object timely to a jury instruction* and in fact passed on the very issue presented. The Court carefully commented that the district court's consideration of the issue was not merely as an alternative ground for decision or out of an abundance of caution, 453 U.S. 253-54 & 256 n.11, and took pains to justify its review of an issue which might have been considered waived:

> "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration . . . would be served if we refused now to reach the merits ourselves."

453 U.S. 256.[19] Here, the district court's comment about Petitioners' failure to present reasons why *Kay v.*

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[19] *See also, Leary v. United States*, 395 U.S. 6 (1969), another case relied on by Petitioners to assert a conflict between the holdings of this Court and the decision below, in which this Court justified upholding a privilege that had not been asserted at the trial level by noting that the court of appeals found no waiver, nor had the party that would have benefitted from a finding of waiver claimed waiver.

The Kattans, of course, argued waiver to both the district court and the court of appeals, and both courts found waiver and declined to reach the merits.

Ehrler, decided under a different statute, should be applied to this EHA case (*see* App. 34a) is at best an alternative ground for decision (*contrast* 453 U.S. at 256, n.11) and more probably simply an expression of frustration at Petitioners' cavalier introduction of the *pro se* issue at the last minute and without any meaningful analysis. And the court of appeals explicitly declined to consider the *pro se* issue. App. 4a. It thus strains the imagination that Petitioners maintain that there is a conflict between the Court of Appeals decision at issue and this Court's decision in the *Newport* case.

Petitioners next suggest a conflict between the decision below and this Court's decision in *Kay v. Ehrler.* Petition at 14-15. Again, Petitioners attempt a sleight of hand. *Kay v. Ehrler* does not concern itself with the bases of the court of appeals decision for which Petitioners seek review, which was the propriety of the district court's finding of waiver and the inappropriateness of the use of Rule 59(e) in particular circumstances. In short, under the reasoning of *Newport,* since the question of whether or not and to what extent *Kay v. Ehrler's* reasoning should apply to this EHA case, had that issue been timely raised, has not been explored by the courts below, the interests of "fair and effective [judicial] administration" will not be served by grant of the writ.

Nor is this Court's recent decision in *Elder v. Holloway,* 62 U.S.L.W. 4149 (February 23, 1994) in conflict with the decision below. There the plaintiff had brought suit alleging violation of his Fourth Amendment rights, but failed to cite an arguably relevant circuit decision which would have been helpful to him to defeat a defense of qualified immunity. The overlooked circuit decision did not inject a new issue or ground of defense into the case, but merely might have supported the position the

plaintiff was taking. This Court reversed the Ninth Circuit, which had decided that it could not take the overlooked decision into account on its review of the trial court's grant of summary judgment against the plaintiff. This Court reversed the Circuit's refusal to consider the impact of the overlooked precedent both because the circuit had erroneously considered the precedent to be a "legal fact" rather than a question of law, and because the circuit's failure to consider all relevant precedent would hinder the purposes of the qualified immunity doctrine.

Neither the court of appeals nor Respondents has taken the position that *if* Petitioners had asserted that *pro se* litigant attorneys were not entitled to attorney fees for their work before judgment, *then* courts on appeal should not be permitted to apply the reasoning of *Kay v. Ehrler* on appeal of the judgment. The whole issue of *pro se* representation was waived by Petitioners here, not simply one authority relevant to that issue.

In addition, in the present case the purposes of the qualified immunity doctrine are not at issue. What is at issue is the power of the trial court to exercise its discretion to award fees and reject untimely arguments that impede the orderly administration of justice when the particular circumstances of a case so require. The court of appeals here has made no erroneous distinctions between law and fact, but has simply upheld discretionary acts of the trial court.

B. There is no conflict with the decisions of other circuits.

Petitioners assert that two circuit decisions are in conflict with the holding below. One of these presents no conflict whatsoever. While the other at first glance

appears to do so, significant factors distinguish it from the ruling that is the subject of this Petition.

In *Weaver v. Bowers,* 657 F.2d 1356 (3rd Cir. 1981), the trial court had held that a defendant had waived a ground of defense to liability by failure to raise that ground before judgment. The Third Circuit agreed that the defense had been waived, and explicitly held that a post-judgment motion to amend did not cure the waiver. The circuit further found that the defendant's reasons for failure to raise the defense were unpersuasive, reasoning as follows:

> ". . . another judge in the district in which this case was pending had considered and filed a reported decision on this very issue. . . . Although that court found [contrary to the defendant's position], it should nonetheless put defendants on notice of the possibility of raising that defense."

657 F.2d at 1361-62. To this point the case is fully in accord with the decision for which review is here sought.

Despite these conclusions, the Third Circuit in *Weaver v. Bowers* went on to exercise its discretion to reach the merits of the waived defense, because it concluded that to do so would vindicate the evenhanded administration of justice. (The court had before it a companion case where the defense at issue had been raised and was outcome determinative, and the court was disinclined to treat the two litigants differently.) The court took care to "limit our decision to the unusual situation at hand" and to emphasize that all litigants were expected to observe the time requirements of the Federal Rules. 657 F.2d at 1362.

The D.C. Circuit panel that ruled on the present case chose to exercise its discretion in the opposite direction.

It had before it a pattern of trial conduct by the Petitioners, and, as far as is known, had before it no other party seeking attorney fees in an EHA case for legal services performed by a parent.

The Eighth Circuit in *Morris v. American National Can Corp.*, 988 F.2d 50 (8th Cir. 1993) permitted a party to invoke an intervening Supreme Court decision to raise a defense to an enhanced attorney fee award in spite of the fact that that party had not argued the theory of the intervening Supreme Court decision prohibiting enhancement in the trial court or on an earlier appeal. Instead, the party seeking the benefit of the change in law had relied on an earlier Supreme Court decision which appeared to permit enhanced fees in the discretion of the court as long as that discretion was exercised within certain guidelines,[20] which earlier decision had already been applied to several cases by the Eighth Circuit. The opinion strongly suggests that the Eighth Circuit was reluctant to hold that a party could waive an issue that the Circuit itself apparently believed had already been decided contrary to that party's position by the Supreme Court. Here, of course, the D.C. Circuit has decided that the defense that attorney fees should not be awarded a *pro se* litigant was a colorable basis for objection which had not been foreclosed by a circuit decision concerning a different statute. Certainly no Court or litigant in the District of Columbia in 1988 had any basis for believing that the question of whether attorney fees were available to *pro se* litigants had already been answered affirmatively by the Supreme Court.

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[20] *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731-34 (1987) (concurring opinion of Justice O'Connor).

Even if one were to reject this distinction and accept the Eighth Circuit's reasoning in *Morris* as correct, two glaring differences distinguish the situation in *Morris* from our case. First, the Kattans themselves raised the *pro se* issue. Second, as soon as the Supreme Court decision relevant to the *Morris* case was issued, the party seeking to use it brought it to the attention of the appropriate court.[21] In contrast, *Kay v. Ehrler* was issued six months before the judgment of the district court, and Petitioners took no steps to bring that decision to the attention of the district court until after judgment. The district court and the court of appeals were entitled to take these facts into account in making the discretionary decision for which review is sought.

Thus there is no conflict with *Morris* and *Weaver*. All three cases reveal the exercise of sound discretion based on the facts of record. Discretionary decisions by their very nature result in outcomes highly dependent on the factual circumstances involved. This Court should conclude that no conflict exists on the facts of these circuit decisions.

V.

THIS CASE DOES NOT PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW.

Petitioners suggest (Petition at 10-12, 21-24) that the decision below is one requiring this Court's intervention because, if upheld, it will require counsel routinely to challenge adverse circuit precedent in the hope that this

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[21] The Supreme Court decision came down nineteen days after the trial court's decision awarding enhanced fees, and the defendant promptly appealed to the Eighth Circuit on that basis. 988 F.2d at 51.

Court will overrule that precedent in resolving conflicts between the circuits, that such challenges will give rise to motions for sanctions, and that the trial courts will be clogged.

Even assuming that the judicial burden argument has merit in theory,[22] this is not the case for this Court to use to instruct on the issue, for the decision below can be upheld on very narrow grounds. Here, Petitioners could have seized on the D.C. Circuit's observation that the "law is not clear" on the availability of fees for *pro se* litigants. Here, Petitioners failed to rely on a decision in their favor from the very court in which they were litigating. Here, the Kattans themselves flagged the issue of *pro se* representation and Petitioners failed to take it up. No sanction motion could have been brought against Petitioners because of these three circumstances. Moreover, contrary to Petitioners' fears, other litigants will be unable to make any particular use of the decision below because it is tied so tightly to its facts. The decision below is but one more example of a court of appeals upholding a discretionary decision by a trial court.

The unusual circumstances of this case also suggest that this case is unique and unlikely to recur in a similar

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[22] As noted previously, Petitioners' entire premise is flawed because, as the court below found, existing precedent in the D.C. Circuit did not necessarily control the outcome of a case brought under the EHA and Petitioners were *not* foreclosed from relying on authorities in their favor on the *pro se* issue when opposing the Kattans' fee application in 1988.

In addition, Petitioners' position is put to rest by the fact that for six months after this Court issued *Kay v. Ehrler* – when by no stretch of the imagination could they be said to be foreclosed from raising the *pro se* issue – Petitioners failed to object to the pending fee petition on this basis.

fact pattern again.[23] There are dangers in creating a new rule of waiver based on idiosyncratic facts such as these, due to the difficulty in foreseeing all the future applications of the principles involved in different factual settings.

Important countervening issues of judicial administration suggest that the decision below should stand. Busy trial courts are given certain tools by which they manage their case loads, keep their dockets moving, force counsel to focus on and select the issues they wish to press and make evenhanded decisions. One of the most fundamental of these tools is the doctrine of waiver, which puts parties on notice that if they oppose a position of an adversary party they should set out in their pleading in opposition all grounds on which that opposition rests.[24] The trial courts are, of course, given discretion to lift waivers and reconsider their rulings in the face of new evidence that a party brings in. Such decisions are committed to the sound discretion of trial judges because it is those judges who are in the best position to balance factors relevant to whether failure to raise all relevant matters on a timely basis should be excused, such as a party's good faith attempt to be timely, whether tactical considerations prompted a party's choices, any prejudice to the opposing party, etc. The waiver doctrine is a long-established one in our jurisprudence. It provides comfort to litigants as to the scope of the issues in a case. It permits courts to issue decisions in cases with comfort that judgments cannot be continually reopened.

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[23] It is obvious that the specific issues presented by this case will never recur, for by *Kay v. Ehrler* this Court has surely dissuaded persons seeking attorneys' fees from representing themselves.

[24] *Compare,* Rules 8, 12(g) and (h), and 51, Fed. R. Civ. P.

In the present case, the trial court made the judgment, on the facts and circumstances of this case, that Petitioners had waived the *pro se* issue. She undoubtedly made this decision in light of factors that may not be readily apparent to this Court, such as the conduct and attitude of trial counsel, the fact that Petitioners did not bother to articulate to her why *Kay v. Ehrler* necessarily applied in the EHA context,[25] the conclusory nature and pettiness of other asserted objections to the Kattans' fee application,[26] and whether she believed Petitioners' failure to alert her to *Kay v. Ehrler* before judgment was responsible. She may even have taken into account the fact that, except for her having taken three years to pass on the fee application, this case would have been concluded well before the *Kay v. Ehrler* decision. Our system delegates the weighing of these factors to the one judicial officer in the best position to do so justly.

If this Court were to review this case, it should defer to the trial court's discretionary finding of waiver. If it does so, the taking of this case will not add much to our jurisprudence, for each case involving waiver is by definition limited to its own facts. If it were to take this case and reverse, the Court would be weakening a valuable tool by which trial judges manage their calendars and require the counsel before them to focus on the issues at hand. We respectfully submit that this case should be left to rest on its own facts and on the discretionary rulings of the courts below.

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[25] *See* App. 34a.

[26] *See* App. 29a-30a (especially the reference to Petitioners' objections that "consist of arbitrary, conclusory assertions").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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